

FILED

AUG 01 2008

PATRICK E. DUFFY, CLERK

By _____
DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JEREMY RASKIEWICZ,)	CV 08-78-M-DWM
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Defendants.)	
)	

United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendation in this matter on July 3, 2008. Judge Lynch recommended dismissing Plaintiff's Complaint and Amended Complaint and counting the dismissal as a "strike" pursuant to 28 U.S.C. § 1915(g). Plaintiff timely objected on July 11, 2008. Plaintiff therefore is entitled to de novo review of those portions of the Findings and Recommendation to which he objected. 28 U.S.C. § 636(b)(1). The portions of the Findings and Recommendation not specifically objected to will be reviewed for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

Plaintiff does not object to the dismissal of this action; he only contends the dismissal should not count as a strike pursuant to 28 U.S.C. § 1915(g). Plaintiff argues because he failed to comply with the Federal Tort Claims Act's exhaustion requirements, the case is being dismissed for lack of subject matter jurisdiction, not as frivolous.

A dismissal for lack of subject matter jurisdiction does not constitute a strike unless the case is frivolous, malicious, or fails to state a claim upon which relief can be granted. O'Neal v. Price, ___ F.3d ___, 2008 WL 2718868, *11 n.9 (9th Cir. July 14, 2008); Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). As Judge Lynch noted, Plaintiff's Complaint and Amended Complaint essentially challenge a state court conviction. This challenge fails to state a claim upon which relief can be granted pursuant to Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) because Plaintiff's conviction has not been invalidated. Thus, not only does this Court lack subject matter jurisdiction to adjudicate Plaintiff's claim against the United States, Plaintiff also fails to state a claim upon which relief can be granted. In these circumstances, a strike is appropriate.

I find no clear error in Judge Lynch's remaining findings and recommendations. Accordingly,


IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendation are adopted in full. Plaintiff's Complaint and

Amended Complaint are DISMISSED.

The Clerk of Court is directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g).

The Clerk of Court is further directed to have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith.

Dated this 19th day of August, 2008.



Donald W. Molloy, District Judge
United States District Court
